

1889

GOPAL
CHUNDER
SREEMANY
v.
HEREMBO
CHUNDER
HOLDAR.

of May the 14th, 1884, is a charge upon the whole of the property mentioned in that mortgage, subject to a charge in favour of the defendant Bindobashinee Dossee for the amount due for principal and interest under her mortgage upon Herembo Chunder Holdar's one-third share of the house in Calcutta, and that the plaintiff do sell the properties not included in such last mentioned mortgage first.

In taking the accounts as between the mortgagors and the mortgagee, the amount found to be due under the mortgage of November 29th, 1882, minus the interest from November 29th, 1882, and May 14th, 1884, must be deducted from the amount found to be due under the mortgage of that date in order to arrive at the sum now due from the mortgagors, the Holdars, to the plaintiff, and for which he is entitled to bring the mortgaged properties to sale.

The plaintiff will be entitled to add his costs to his mortgage and, under the circumstances of the case, the costs of the defendant, Bindobashinee Dossee, should also be added to her mortgage.

Appeal allowed.

Attorney for the appellant: Baboo *N. C. Bural*.

Attorney for the respondents: Mr. *C. N. Manuel*.

T. A. P.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson, and Mr. Justice Tottenham.

JOGGOBUNDHU MITTER (PLAINTIFF) v. PURNANUND GOSSAMI
AND ANOTHER (DEFENDANTS).*

Limitation Act (XV of 1857), Sch. ii, art. 142—Symbolical possession.

On the 7th November 1868, certain property was purchased by one Gopal Dass Banerjee at a sale held in execution of a decree obtained against one Jogodanund Gossami. On the 8th January 1873, the purchaser obtained a

* Full Bench on Appellate Decree, No. 2321 of 1887, against the decree of H. Mathews, Esq., Officiating District Judge of Nuddea, dated 5th August 1887, reversing the decree of Babu Nuffer Chunder Bhutto, Subordinate Judge of that district, dated the 22nd September 1886.

1889
March 21.

sale certificate, and, on the 10th August 1873, was put into symbolical possession of the property through the Court.

On the 3rd March 1875 the plaintiff, in execution of a decree obtained against Gopal Das Banerjee, purchased this property, symbolical possession of the property being given to him by the Court on the 31st March 1875.

On the 7th August 1885, the plaintiff brought this suit to recover possession of this property, alleging that he had been dispossessed therefrom on the 13th July 1885 by the defendant No. 2, who had taken an izara of the property from the son of Jogodanund. The defence set up was limitation.

Held, that on the principle laid down in *Juggobundhu Mukerjee v. Ram Chunder Bysack* (1) the suit was not barred.

Krishna Lal Dutt v. Radha Krishna Surkhel (2) overruled.

THIS was a reference to a Full Bench made by Petheram, C.J., and Trevelyan, J., on the 9th March 1889; the referring order was as follows:—

“The land in dispute originally belonged to one Jogodanund Gossami. In execution of a decree against him, it was sold on the 7th November 1868 to one Gopal Das Banerjee. Gopal Das Banerjee obtained a sale certificate on the 8th January 1873, and, on the 10th August of the same year, obtained, through the Court, what is called symbolical possession, that is, delivery was made in accordance with s. 319 of the Civil Procedure Code. The land was then, and has since been, in the possession of tenants. Neither Gopal Das nor the plaintiff have obtained possession of the property in any other way. On the 3rd March 1875, the plaintiff purchased this property at a sale held in execution of a decree obtained against Gopal Das, and, on the 31st March 1875, obtained symbolical possession.

“This suit is brought on the 7th August 1885, against Purnanund Gossami, the son of Jogodanund, who has died, and a person who has taken an izara from Purnanund.

“The Lower Appellate Court, relying on the authority of the case of *Krishna Lal Dutt v. Radha Krishna Surkhel* (2), has held that the suit is barred by limitation under the provisions of article 138 of the second schedule of the Limitation Act, and has not considered the other questions in the case.

(1) I. L. R., 5 Calc., 584.

(2) I. L. R., 10 Calc., 402.

1889
JOGGEBUN-
DHU MITTEN-
v.
PURNANUND
GOSSAMI,

1889

JUGGOBUN-
DHU MITTERv.
PURNANUND
GOSSAMI.

"As we have doubts as to the correctness of the decision in the above cited case, we refer to the Full Bench the question whether the suit is barred?"

"The following cases were also cited to us: "*Juggobundhu Mukerjee v. Ram Chunder Bysack* (1), *Lokessur Koer v. Purgun Roy* (2), *Shama Charan Chatterji v. Madhub Chandra Mookerji* (3), and *Uma Shankar v. Kalka Prasad* (4)."

Babu Mohesh Chunder Chowdhry, for the appellant, contended that the suit was not barred, referring to *Juggobundhu Mukerjee v. Ram Chunder Bysack* (1), *Lokessur Koer v. Purgun Roy* (2), and *Shama Charan Chatterji v. Madhub Chandra Mookerji* (3).

Babu Hem Chunder Banerjee, for the respondents, contended that neither the plaintiff nor his predecessor in title had ever enjoyed possession of the property, and therefore the suit was barred; that the symbolical possession given to Gopal Das and the plaintiff would not disturb the possession of Jogodanund; and referred to *Krishna Lall Dutt v. Radha Krishna Surkhel* (5) and *Uma Shanker v. Kalka Prasad* (4).

The opinion of the Court (PETHERAM C.J., MITTER, J., PRINSEP, J., WILSON, J., and TOTTENHAM, J.) was as follows:—

The question referred to the Full Bench is stated in these words: "Is this suit barred by limitation?" And the reason for the reference is that the learned Judges doubt the correctness of the case of *Krishna Lall Dutt v. Radha Krishna Surkhel* (5), followed by the Lower Appellate Court in the present case.

The suit was brought to recover possession of a 4-annas' share of Mouzah Mukannagur, upon the allegation that the defendant No. 2 had dispossessed the plaintiff on the 31st of Assar 1292 (which was some day in July 1885); and the suit was instituted on the 7th of August following. The plaintiff's case was that he had purchased the property at auction in execution of his own decree against one Gopal Das Banerjee on the 3rd of March 1875; that he had obtained possession through the Court, and had enjoyed possession by the receipt of rent until disturbed and ultimately ousted by the defendant No. 2.

(1) I. L. R., 5 Calc., 584.

(3) I. L. R., 11 Calc., 93.

(2) I. L. R., 7 Calc., 418.

(4) I. L. R., 6 All., 75.

(5) I. L. R., 10 Calc., 402.

Gopal Das Banerjee had, it was alleged, acquired the property by purchase at auction in execution of a decree against Jogodanund Gossami on the 8th of January 1873, and had obtained possession through the Court on the 10th of August of that year.

1889

JOGGEBUN-
DHU MITTER
v.
PURNANUND
GOSSAMI.

Among the pleas raised by the defendants was that of limitation; for it was contended that the plaintiff, who had purchased the property in 1875, had never enjoyed any possession of it; and that his predecessor in title, Gopal Das Banerjee, had likewise failed to obtain any real possession. The defendants are two in number, the first being the son of the Jogodanund Gossami, whose interest in the property was sold in execution of a decree in 1868; and the second being a person claiming possession as *izaradar* under him.

On the point of limitation the defendants' case is that the possession of Gossami was never disturbed by the execution proceedings either against Jogodanund, or against Gopal Das Banerjee. The Courts below have negatived the plaintiff's allegation that he ever had *substantial* possession of the property.

The question, therefore, whether the present suit is barred by limitation or not depends upon the legal effect to be given to the *symbolical* possession, as it is called, obtained on the 10th of August 1873 by Gopal Das Banerjee as against the father of defendant No. 1. For this suit was instituted within 12 years of that date.

The symbolical possession, obtained by the plaintiff in 1875, would not affect the defendants who were not parties to the execution proceedings against Gopal Das Banerjee.

We are of opinion that the rule laid down in the Full Bench case of *Juggobundhu Mukerjee v. Ram Chunder Bysack* (1), is applicable to this case, and that its application saves the suit from the bar of limitation. That was a suit in which the assignee of a decree for possession of certain immoveable property had been put in formal possession by process of execution under s. 224 of Act VIII of 1859, and had then sold his interest to the plaintiffs, who had since been unable to obtain possession, and sued to recover it from the original defendant. The Full Bench held that the symbolical possession obtained by the plaintiffs' vendor was effective as against the judgment-debtor defendant, and that

(1) I. L. R., 5 Calc., 531.

1889 the suit brought against him within 12 years of that event

JOGGEBUN-
DHU MITTER

vs.
FURNANUND
GOSSAMI.

was not barred by limitation.

In the present case the Court of first instance held,—and we think rightly held,—that the principle there laid down as to symbolical possession obtained by the decree-holder under his decree, is equally applicable to the case of a purchaser at auction in execution of a decree. It is the only mode in which the Court can give the purchaser possession, and as against the judgment-debtor it is effective for all purposes.

The case noticed by the Division Bench which referred this question to the Full Bench, *Krishna Lall Dutt v. Radha Krishna Surkhel* (1), was decided without reference to the earlier Full Bench case which was apparently not brought to the notice of the Judges.

By applying the principle laid down by the Full Bench in *Juggobundhu Mukerjee v. Ram Chunder Bysack* (2), we find that the judgment-debtor was actually in possession on the 10th August 1873, and was entitled to be in possession again from that or any subsequent date when he was dispossessed by the previous owner.

The present suit having been instituted within 12 years of the 10th of August 1873, our answer to this reference must be that the suit is not barred by limitation.

The result is that the decree of the Lower Appellate Court must be set aside and the case must go back to be determined on the merits.

T. A. P.

(1) I. L. R., 10 Calc., 402.

(2) I. L. R., 5 Calc., 584.